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No. 92-1544

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

PACIFIC LEGAL FOUNDATION,

Petitioner,

v.

PAUL KAYFETZ, *et al,*

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MOTION FOR LEAVE TO FILE BRIEF AMICI CURIAE AND BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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MOTION FOR LEAVE TO FILE BRIEF OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND THE MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND AS AMICI CURIAE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

The NAACP Legal Defense and Educational Fund, Inc., and the Mexican American Legal Defense and Educational Fund move the Court for leave to file the attached brief *amici curiae* in support of the grant of a writ of certiorari in the present case.[1] The motion for leave to file states the interest of *amici*.

[1]The Petitioner has consented to the filing of the attached brief, but respondent has refused consent.

The NAACP Legal Defense and Educational Fund, Inc. ("LDF") is a non-profit corporation that was established for the purpose of assisting black citizens in securing their constitutional and civil rights. It was established in 1940 as a legal aid society under the laws of the state of New York, and is one of the oldest public interest legal organizations in the United States. This Court has noted the Fund's "reputation for expertness in presenting and arguing the difficult questions of law that frequently arise in civil rights litigation." *NAACP v. Button*, 371 U.S. 415, 422 (1963).

The Mexican American Legal Defense and Educational Fund ("MALDEF") is a non-profit national civil rights organization headquartered in Los Angeles. Its principal objective is to secure, through litigation and education, the civil rights of Hispanics living in the United States

As public interest legal organizations LDF and MALDEF have a deep concern with the use of a federal court's "inherent power" to impose sanctions on organizations seeking to carry out the Congressional policy of private enforcement of the civil rights laws and other laws impacting on the public interest. Further, we are concerned with the use of the sanctioning power on plaintiffs and private counsel who seek to vindicate their rights in federal court.

We believe our long experience as public interest organizations will be of assistance to the Court in deciding whether to grant certiorari in this case. Therefore, we pray

The American Center for Law and Justice, a nonprofit corporation which sponsors pro-family and pro-liberty litigation in the public interest, joins this motion and brief.

that leave be granted to file the accompanying *amicus curiae* brief in support of the petition for a writ of certiorari.

Respectfully submitted,

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ARGUMENT

THE DECISION BELOW RAISES IMPORTANT QUESTIONS CONCERNING THE SCOPE AND MEANING OF THIS COURT'S DECISION IN CHAMBERS V. NASCO, INC.

I.

Amici believe that review of the Ninth Circuit's decision is particularly important because of the basis on which that court justified the use of "inherent authority" to impose sanctions on a not-for-profit public interest legal

organization that was supporting litigation. The decision below was founded on assumptions about the manner in which such an organization functions that are, with all due respect, not accurate. These assumptions were the basis of the holding that the district court had the authority to impose sanctions on the Pacific Legal Foundation even though the foundation was not subject to Rule 11, F.R.Civ. Proc., 28 U.S.C. § 1927, or any other rule or statute that provided for the imposition of sanctions.

Thus, the court below cited the acknowledgement of Pacific Legal Foundation in its appellate brief that it seeks "to participate in precedent setting litigation in the public interest" as inconsistent with the Foundation's position that it was furnishing counsel to plaintiffs who could not otherwise afford to bring suit. The court held that because the Foundation's goal was to "establish a legal precedent" the plaintiffs were merely "nominal" and "were merely pawns or puppets in this effort." *Lockary v. Kayfetz*, 974 F.2d 1166, 1171 (9th Cir. 1992).

Amici urge that the fact that an organization has as one, or even a primary goal, the establishment of precedent does not in any way lead to the conclusion that the plaintiffs in the lawsuits it supports are either nominal or "pawns or puppets." Organizations such as the Foundation and *amici* are limited in resources. They cannot serve as general legal aid providers and represent everyone who seeks their services, even if the cases are within the scope of their purposes and expertise. They are necessarily selective, and attempt to choose those cases that will have the greatest impact either in terms of establishing precedent that can then be used by others in similar circumstances, or by bringing actions that will in themselves affect many persons. The ideal case, of course, is one that accomplishes both purposes.[1]

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[1]Thus, an employment discrimination case brought as a class action on behalf of a large group of workers at a particular plant can both directly benefit the plaintiffs and establish a precedent that can

In either event, the interests of the real people with real claims on whose behalf actions are brought are not only central but, properly, paramount. Attorneys who work for public interest organizations are fully aware of their ethical obligations to represent the interests of their clients, and do not subordinate them to the dictates of "a higher cause." While the decision whether or not to take a case in the first instance may be dictated by whether that case, among many other possible cases, is compatible with and will further the objectives of the organization, once representation has been assumed, litigation decisions are made based on whether the interests of the clients will be served.

For example, it is not uncommon that a case that was taken as a vehicle for the vindication of a legal principle, will result in a settlement that provides appropriate relief for the plaintiffs. Organizations such as *amici* fully understand that if such is the case, the settlement must be presented to their clients and accepted on their behalf if that is their decision. This is mandated not only by ethical standards, but also, in the case of class actions, by the requirements of Rule 23, F.R. Civ. Proc.

Of course, disagreements between public interest lawyers and their clients may arise, just as they arise between any other lawyers and their clients. If conflicts do arise, they must and are resolved consistent with the ethical obligations of the lawyers, and there are instances in which a public interest legal organization may have to seek to be relieved as counsel if the differences are irreconcilable. Although, in the experience of *amici*, such instances are rare, they have occurred in the many years of the our work.

Thus, certiorari should be granted to make clear the extent to which, if any, the fact that an organization supports litigation that is consistent with its purposes is a proper basis

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benefit large numbers of other persons. Two examples from the work of LDF are *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971) and *Albemarle Paper Co. v. Moody*, 422 U.S. 405 (1975).

for holding that it can be sanctioned for abuses that occur during the course of the litigation. The activities of such organizations have long been held to be protected by the first amendment. *NAACP v. Button*, 371 U.S. 415 (1963); *In re Primus*, 436 U.S. 412 (1978). The decision of the Ninth Circuit has grave implications for the ability of such organizations to carry out constitutionally protected activities free of the chilling effect of the danger of the imposition of sanctions based on pre-conceived notions of their role in supporting litigation.

II.

Certiorari should also be granted in the present case because it presents an opportunity for the Court to deal with a broader issue of great importance for the guidance of the lower courts, the proper application of the decision in *Chambers v. Nasco, Inc.*, 111 S.Ct. 2123 (1991). In *Chambers* this Court affirmed the use of inherent powers to sanction a party before the district court for actions taken by that party in and out of court with the intent of impeding or directly disobeying the rulings and orders of the court, such out-of-court actions not being within the reach of the terms of the various fees acts, Rule 11, section 1927, or other bases for imposing sanctions. Rather than applying *Chambers* to comparable factual situations, in a number of instances the lower courts have extended *Chambers* far beyond its appropriate reach.

Thus, *Chambers* involved a party who was responsible for litigation carried out for abusive purposes and for out-of-court actions designed to undermine the district court's jurisdiction. The award of sanctions was based on record-based factual findings that established responsibility for the sanctioned actions. In the present case, on the other hand, the sanctions were based on assumptions that formed the predicate for a holding that the named plaintiffs were not the real parties in interest, but that rather an organization that supported the litigation was. Moreover, the present

case involves alleged improper litigation conduct that occured entirely in court, all of which could ahve been reached through Rule 11 or section 1927. Yet the district court resorted to the use of inherent power.

Another case that involves an unwarranted extension of *Chambers* is *Sassower v. Fields*, No. 92-1405, *cert. denied*, April 19, 1993. In that case, the court of appeals first held that fee shifting was not proper under the fee provision of the Fair Housing Act, that sanctions were not proper under Rule 11 and only partly proper under section 1927, but then affirmed the entire award of sanctions under the authority of *Chambers*. The present case and *Sassower*, *amici* submit, are indicative of a growing trend to undermine the American Rule as explicated in *Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240 (1975), by swallowing it up through the over-expansion of exceptions to it. We urge that it is essential that the Court provide guidance to the lower federal courts as to the proper scope and meaning of *Chambers v. Nasco, supra*.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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